

Transitional justice must be public

Written by Li Chung-chih 李忠池
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In contrast with classical notions of justice, transitional justice is a relatively new concept. Its purpose is to define and punish the illegal actions of a previous government and to provide justice for victims following the transfer of political power to a new administration that holds radically different — sometimes even diametrically opposed — beliefs.

The process often involves a conflict between the recollection of past events and the interpretation that is given to those events, the conflict between beliefs and the need to obey orders, and the relationship between the individual and the state. It is an intellectual minefield, which is why the moral basis for transitional justice continues to be hotly debated by philosophers.

In the real world, the majority of violent political transformations occur due to revolution or war. The model for change is usually relatively simple and frequently results in justice flowing to the side of the victors.

Nations that have experienced a peaceful transition from totalitarian rule to democracy face a different set of problems. When a peaceful transition takes place, there is a high degree of crossover between the participants of the old regime and the one that replaces it.

Politicians try to cling to power and the need for compromise is often overstated. They often use the transition of political power to simultaneously evade the judgement of history and escape punishment under the law. This results in an entire generation of lawbreakers being systematically let off the hook.

Spain's General Francisco Franco and Chiang Kai-shek (蔣介石) died in the same year, but Chiang had a son to succeed him. This set Taiwan's democratization process back 10 years. Despite the delay, Taiwan followed in the footsteps of Spain, whose so-called peaceful revolution, although superficially smooth and successful, has been found wanting in terms of transitional justice.

Spain's post-Franco government was entirely made up of high-ranking officials from the old regime. In 1977, the Amnesty Law was passed to provide cover to officials within the Franco

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regime who had committed human rights violations. Even today, the Amnesty Law continues to hold up the process of transitional justice in Spain.

Ten years later, in 1987, martial law was lifted and the National Security Act (LO 1/1987) was implemented. Article 9 of the act unconditionally upholds judgements made by the military courts during the Martial Law era and prohibits the right of appeal.

The act actually overrides Article 10 of the Martial Law Act (LO 1/1987), which states that once martial law is lifted, such judgements may be appealed according to the law.

Taiwanese had hoped that after 38 years of martial law justice would finally be done, but in the end, on the day that martial law was lifted, their hopes were dashed.

Following three lost decades, Spain finally passed the Historical Memory Law in 2007. Parts of the law are quite progressive. For instance, it provides for the removal of Francoist symbols from public buildings and spaces. However, in the main, the law is a product of far-reaching compromise.

Although then-Spanish prime minister Jose Luis Rodriguez Zapatero's grandfather was a victim of the Franco regime, executed by Franco's army during the Spanish Civil War, Zapatero was heavily criticized by those within his own camp.

Criticisms ranged from providing too little compensation to the families of victims to failing to reinstate property and assets confiscated by the Franco regime, to "privatizing" the truth by throwing money at the problem while taking a hands-off approach and for recognizing the verdicts of trials that took place under the Franco regime.

These criticisms should not simply be written off as the emotional criticisms by victims' relatives. By refusing to repeal the Amnesty Law, Zapatero's government has made it impossible for violators of the law during the Franco dictatorship to be pursued through the courts.

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As it happens, Taiwan is again 10 years behind Spain with President Tsai Ing-wen's (蔡英文) administration now seeking to enact a controversial transitional justice act. It seems that any act would suffer from the same deficiencies and gaping holes as Spain's Historical Memory Law. It would be an empty framework legislation that is unlikely to achieve much, probably not even including the removal of all Chiang statues.

At present, aside from the government's stated aim of uncovering the truth and assigning responsibility to perpetrators, there has yet to be any concrete discussion of what legal route the government intends to take to achieve this aim.

Would compensation be handled through foundations, as has been done in previous compensation acts, or would a bill be passed to repeal the National Security Act (国家安全法)?

If that is the case, how does the government intend to deal with the enormous number of judgements accumulated by military tribunals during the 38 years of martial law? Is the judiciary willing — and able — to grapple with these difficult issues?

Transitional justice is more than just a verbal exercise, it is perhaps even more complex than drafting a constitution. If it were a relatively simple task, the UN would not expend energy formulating transitional justice guidance nor volunteer its assistance in these matters.

If the state does not want to be involved, there would be no judges, no prosecutors, no defendants and no indictments, but only juries made up of witnesses, friends and relatives. If the truth continues to be privatized, hidden from public view, should we take it seriously?

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